PERWIRA HABIB BANK MALAYSIA

v.

LOO & SONS REALTY SDN. BHD. & ANOR.

HIGH COURT KUALA LUMPUR
DATO' K. C. VOHRAH J
[ORIGINATING SUMMONS NO. S6-24-1278-1990]
2 AUGUST 1995

LAND LAW: *Lien-holder's caveat - 2nd defendant unregistered purchaser of land - 2nd defendant executing 2 charges in escrow over land as security for a loan from plaintiff to third party - Title deed deposited with plaintiff - Plaintiff lodging lien-holder's caveat over land - Whether a non-proprietor has the right to deposit a title to create a lien - Whether the deposit of the title was authorised by proprietor - Whether there was the intention to create a lien - Whether the plaintiff had an equitable lien to the title deed.*

WORDS & PHRASES: *"proprietor" - Section 5 National Land Code.*

The 1st defendant was the registered proprietor of land held under HS(M) 1109, PT No. 26, Lot 25, Mukim of Kuala Lumpur (the said land). In December 1993, the 2nd defendant purchased the said land and was given the title deed but could not register the transfer as the consent of the State Authority was required. In August 1994, the plaintiff granted a loan to MAA Holdings Sdn. Bhd. (MAA) upon the 2nd defendant agreeing to secure the loan by a charge over the said land. The 2nd defendant executed 2 charges in escrow and deposited the title deed with the plaintiff. Pending registration of the transfer, the plaintiff lodged a lien-holder's caveat over the land on 20 September 1984. At this time the consent of the State Authority had still not been obtained. The plaintiff obtained judgment against MAA and filed a claim for a declaration that the lien-holder's caveat was valid and enforceable and for an order for sale of the said land to satisfy the sum due from MAA.

The plaintiff contended that it had a right to realise the security by virtue of the lien-holder's caveat or as holder of the title deed upon which it held an equitable lien. It further contended that the 2nd defendant's intention was to secure MAA's loan with the deposit of the title deed and as the 1st defendant had delivered the title to the 2nd defendant to deal with it in any manner, the 2nd defendant was thereby authorised to do so. The 2nd defendant submitted that at all material times the plaintiff knew that the said land had been purchased from the 1st defendant, had not yet been registered into the name of the 2nd defendant and was subject to a restriction. The 2nd defendant argued that it did not in fact deposit the title deed with the plaintiff to create a lien-holder's caveat as security for the loan to MAA and as a non-proprietor of the said land it could not deposit the title.

Held:

[1] By virtue of the definition of "proprietor" under s. 5 of the National Land Code, only a registered proprietor of land has the power or right to deposit the title to land to create a lien. Thus, it is not possible for a third party with whom the relevant document has been deposited to then use that document to create a lien in his name.

[2] The 1st defendant's deposition of the title with the 2nd defendant was to allow the 2nd defendant to have safe custody of the title until the requisite consent from the State Authority was obtained failing which the agreement must determine. There is no evidence that the 1st defendant authorised the 2nd defendant to deposit the said title with the plaintiff nor that the 1st defendant knew the 2nd defendant was depositing the title with the plaintiff.

[3] Factually, there was no evidence that a lien was, if one was capable of being created by a non-proprietor in the position of the 2nd defendant, intended to be created.

[4] The plaintiff had in its possession the title to property which was registered in the name of the 1st defendant and not the 2nd defendant. The 2nd defendant had no rights arising from it when it deposited the title with the plaintiff. The lien-holder's caveat lodged was therefore bad and there can be no right in equity to a lien when none can exist.

[Plaintiff's claim dismissed with costs].

Cases referred to:
Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] MLJ 47 ***(refd)***
Peter P' Chient v. Ramasamy Chetty [1923] 3 FMSLR 220 ***(foll)***
Paramoo v. Zeno Ltd. [1968] 2 MLJ 230 ***(refd)***

Legislation referred to:
National Land Code, ss. 5, 281
Registration of Titles Enactment 1911, s. 80

Other source referred to:
National Land Code, A Commentary, 2 edn., p. 640

For the plaintiff - S.M. Yoong (M.K. Lim with him); M/s. Shook Lin & Bok.
For the 1st defendant - Anthony Leong; M/s. Riza Leong & Partners.
For the 2nd defendant - Ranjit Singh; M/s. Cheang & Ariff.

JUDGMENT

K.C. Vohrah J:

The plaintiff claims for a declaration that its lien-holder's caveat lodged over land held under HS(M) 1109, No. P.T. 26, Lot 25, Mukim Kuala Lumpur (the said land) is valid and enforceable and for an order that the said land be sold under the National Land Code (the NLC) to satisfy the sum of RM2,866,89.08 due to the plaintiff from MAA Holdings Sdn Bhd (MAA). MAA is not a party to these proceedings.

There is an alternative claim and it is for a declaration that the plaintiff is entitled to a sale of the said land by reason of the deposit of title to the land with the plaintiff by way of security and the plaintiff's possession of the said title. There is a prayer for an order that the said land be sold by public auction and for it to be transferred under the NLC pursuant to a lien-holder's caveat and for an order that the proceeds of the sale be employed to satisfy the debt due to the plaintiff from the borrower.

The summons claims several consequential orders.

The 1st defendant is the registered proprietor of the said land. In December 1983 through a sale and purchase agreement the 2nd defendant purchased the said land from the 1st defendant. The 1st defendant could not and till today cannot effect registration of the transfer of the said land into the 2nd defendant's name as the title contains a restriction that it cannot be transferred or charged without the consent of the State Authority. Till today the State Authority has not given consent for the transfer of the said land.

But in respect of this said land, in August 1984, the plaintiff agreed to lend money to MAA and the 2nd defendant agreed to provide the security in the nature of a charge over the said land.

The 2nd defendant executed 2 charges in escrow as requested by the plaintiff. The issue document of title to the said land was deposited contemporaneously, by the 2nd defendant with the plaintiff when the first charge in escrow was executed.

Pending registration of the transfer the plaintiff lodged a lien-holder's caveat (in connection with the second charge in escrow) over the land on 29 September 1984 after the first lien-holder's caveat was withdrawn.

On 19 August 1989, the plaintiff obtained judgment against MAA in respect of the outstanding loan for the sum of RM1,491,466.34 with interest thereon at 16.5% per annum on monthly rests from 9 May 1986 to date of payment.

The plaintiff argued it has a right to realise the security pursuant to its rights under the lien-holder's caveat of 22 July 1988 or as holder of the issue document of title to the land. In gist the 2nd defendant's stand is that the mere deposit of the title could not have entitled the plaintiff to something greater than what was bargained between the plaintiff and the 2nd defendant.

The 2nd defendant points out and I accept it as more probable that the plaintiff at all material times knew that the land which the 2nd defendant had agreed to be charged had been bought from the 1st defendant pursuant to an agreement dated 16 December 1983 and that it had not yet been registered in the name of the 2nd defendant and that, more importantly, the title to the land contained the restriction that it cannot be transferred or charged without the consent of the State Authority.

An observation has to be made here on the matter of the sale of the property. As stated earlier the contract for the sale of the said land was made conditional upon the consent of the State Authority being obtained and till today the consent has not been obtained. Sometime in June and July 1984 the then solicitors of the 1st and 2nd defendants agreed to an extension of time for the balance purchase price to be paid. Needless to say that extension must be understood in the context that the State Authority's consent had to be obtained. What has happened since is that the consent has not been obtained and there is no question of the contract being fulfilled. The 2nd defendant is clearly entitled to treat the contract as at an end for non-fulfilment of the condition precedent within a reasonable time (see *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1960] MLJ 47 at 49). It is not for the plaintiff who was not privy to the contract in this case to dictate what the parties to the sale and purchase agreement ought to do or not do in regard to their contractual relationship.

I now come to the argument advanced by the 2nd defendant that the 2nd defendant could not have in law and in fact did not, deposit the issue document of title with the plaintiff to create a lien-holder's caveat as security for the loan to MAA.

The first point the 2nd defendant took was that the 2nd defendant was (and is not) the proprietor of the said land and therefore could not deposit the title. Section 281 of the NLC reads:

> 281(1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue or document of title or, as the case may be, duplicate lease; and that person or body:
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry, of a lien-holder's caveat: and
>
> (b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.

The word "proprietor" in the section is defined under s. 5 of the NLC as meaning "any person or body for the time being registered as the proprietor of any alienated land." What therefore has to be noted under the section is that only a registered proprietor of land has the power or right to deposit the title to land to create a lien and this provision makes explicit what the Court of Appeal in *Peter P' Chient v. Ramasamy Chetty* [1923] 3 FMSLR 220 at 223, 237 (in regard to s. 80 of the Registration of Titles Enactment 1911 where the language was silent) decided and held, that only the proprietor can make a good deposit of his grant or certificate of title. Thus it is not possible for a third party with whom the relevant document has been deposited to then use that document to create a lien in his name. Even assuming that a lien can be created by a person who is not the proprietor of the land and that person has deposited the title to secure a loan one other matter has to be shown - that is, that there was the intention to create this particular form of security when the lien-holder's caveat was entered. As was succinctly put by Judith Sihombing (*National Land Code, A Commentary*, 2 edn. 640)

> The deposit must be with the intention of creating a lien: thus if there is a deposit for safe-keeping no lien will be created. The intention must be to create this type of security: if a charge is intended, then it would seem that the unregistered charge should not be protected as a lien. Indeed one can caveat a charge pending registration. Why then enter a lien-holder's caveat if the transaction is really a charge?

The plaintiff argued the 2nd defendant's intention was to secure MAA's loan with the deposit of the title deed. As the 1st defendant had delivered the title deed to the 2nd defendant to deal with it in any manner, the 2nd defendant had the authorisation of the 1st defendant to deposit the title deed with the plaintiff. I do not agree.

In my view, the 1st defendant's deposition of the issue document of title with the 2nd defendant was to allow the 2nd defendant to have safe custody of the title until the requisite consent from the State Authority had been obtained. In fact if the consent is not obtained, the agreement must determine. The 1st defendant also in fact undertook to refund to the 2nd defendant all the purchase price in the event that the consent is not obtained (see exchange of letters between the solicitors for the 1st defendant and for the 2nd defendant. En. 25, letter (Exh. 1) and letter dated 14 May 1984 in Exh. K) I can see no evidence pointing to the allegation that the 1st defendant authorised the 2nd defendant to deposit the said title with the plaintiff and nothing has been made out by way of evidence that the 1st defendant knew that the 2nd defendant was depositing the title with the plaintiff and certainly it is hard to see any merit in the later argument of the plaintiff that the 2nd defendant was acting as agent for the 1st defendant, the registered proprietor of the land.

I cannot but agree with the argument of the 1st defendant that, factually, there is no evidence that a lien was, if one was capable of being created by a non-proprietor in the position of the 2nd defendant, intended to be created and in fact the evidence points the other way:

(i) the plaintiff knew at all times that the 2nd defendant was not a proprietor and therefore knew that the 2nd defendant as a matter of law had no right to create a lien;

(ii) that the title was deposited contemporaneously with the execution of the first charge in escrow and the existence of the charge in escrow is contemporaneous evidence of intention to create no other security but a charge;

(iii) unlike the case of *Paramoo v. Zeno Ltd* [1968] 2 MLJ 230, where the charge in escrow contained a provision evidencing an express intention to create a lien, both charges in escrow do not contain such a provision.

The above argument has gone on the supposition that a lien is capable of being created by a non-proprietor but my view, I re-iterate, is that only a registered proprietor of the land has the power to create a lien.

I next go to the alternative argument that the plaintiff has an equitable lien to the title deed and therefore the Court may grant the plaintiff an order for sale of the land and the manner of the sale is the same as provided in the NLC. As there is no contract of sale arising until the condition precedent that the State Authority gives its consent for the transfer is fulfilled how did the 2nd defendant ever get any beneficial rights over the said land?. And how is it possible for the 2nd defendant to pass non-existent rights in equity to the plaintiff?. The plaintiff had in its possession the title to property which was registered in the name of the 1st defendant not the 2nd defendant and it was the 2nd defendant who had no rights arising from it who deposited it with the plaintiff. I have already held the plaintiff's lien-holder's caveat that was lodged is bad and I cannot see a right in equity to a lien when none can exist.

In all the circumstances of the case the plaintiff's claim must be dismissed and I do so with costs.